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IN THE

SUPREME COURT

OF THE
UNITED STATES
OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, et al.,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, et al.,
Respondents.

No. 78-119

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,
Respondents.

PETITIONER STATE OF WASHINGTON'S REPLY BRIEF

SLADE GORTON,
Attorney General
EDWARD B. MACKIE,
Deputy Attorney General
JAMES M. JOHNSON,
Sr. Assistant Attorney General
TIMOTHY R. MALONE,
Assistant Attorney General
Counsel for Petitioner State

Office and Post Office Address:
Temple of Justice, Olympia, Washington 98504, (206) 753-6207

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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SUMMARY OF ARGUMENT

In the introduction (pp. 5-12) we examine the roots of the acrimony which has pervaded this controversy. By so doing, we focus upon the basic legal issue presented to this

Court for resolution: What are the treaty rights of the Indians with respect to the present commercial fishery — a fishery created well after treaty-time by non-Indian technology to supply a predominately non-Indian market?

The lower federal courts have ruled that the treaties require a 50% plus allocation of *this* fishery to the treaty Indians. That allocation is rigid; that is, it cannot vary according to the relative numbers of treaty Indian fishermen on the one hand and non-Indian fishermen on the other. For the State to manage the fishery in any way that does not result in that division of the resource has been found to be a violation of the treaty. Thus, the non-Indian fishermen are deprived of a fair opportunity to compete with the tribal fishermen. Hence, the acrimony.

This result, we show, is completely inconsistent with the Puyallup series of decisions, wherein the Court made it clear that the treaty language incorporates equal protection principles. Accordingly, all fishermen, no matter which group they belong to, have no more than a fair opportunity to compete with each other under a nondiscriminatory system of state regulation.

The central questions in this controversy are the meaning of the "in common" language of the treaties and the correctness of the lower federal courts' 50% plus allocation formula, based upon their reading of that language. Before discussing those questions further, we take up the threshold question: Should this Court consider these central questions on the merits at all? (pp. 13-20) The assertion of the tribes that res judicata prevents this Court from addressing these questions is, we show, without substance, as is likewise the assertion of the Solicitor General that principles of finality and comity require a like treatment. We show that a final resolution of this controversy — and elimination of the acrimony — can be best attained by this Court's addressing the merits.

Before we examine the merits in detail, we show how the lower court's formula works in operation, and how it entitles the Indian fishermen to "fifty percent plus" of the fish. (pp. 21-25) We also show that, although the Indian

fishermen are not yet harvesting their full entitlement in all areas, there is every reason to believe that they soon shall be.

Turning to merits, the Puyallup decisions are discussed in detail. (pp. 26-33) Two questions are here addressed: First, do those decisions require any numerical allocation or apportionment for the salmon fishery? We show that they do not. For the steelhead fishery involved in Puyallup, an allocation was the only available alternative for avoiding discrimination against the Indian fishermen; and it was just such an alternative which was ultimately adopted. For the salmon fishery, there are other nondiscriminatory alternatives available; an "equal opportunity fishery" which is feasible.

Secondly, if we are wrong in our submission on this first question, and if some allocation is required by the treaties, must it be the allocation decreed by the lower federal courts? We show that in *Puyallup II*, 414 U.S. 44 (1973), any allocation formula must take into account many variables, including the relative numbers of fishermen in each group, Indian and non-Indian. Any accommodation of the rights of these fishermen, based upon the equal protection principles embodied in the treaties, must take this all-important variable into account.

The Solicitor General and the tribes argue, of course, that this variable cannot be taken into account; basing their argument upon the supposed *tribal* nature of the fishing right. We examine that claim in detail, (pp. 24-39) and show that the claim is supported neither by the text of the treaties nor by the history of the treaty negotiations. Furthermore, the 50% plus percent allocation cannot be applied logically and consistently in practice.

Both the Solicitor General and the tribes rely upon the history of another set of treaties involving fishing rights and containing "in common" language. Those are the 1818 and 1854 treaties with Great Britain, involving the North Atlantic fishery. After showing that there are indeed close parallels between these treaties and the

Indian treaties of 1854 and 1855, we show that the history of these British treaties support the position of the State not that of the Solicitor General and the Tribes (pp. 40-45).

Finally, we take a look ahead (pp.49-55, Parts VIII and IX). We show that the Indian fishermen now have the fishing gear and technological capability to compete with the non-Indian fishermen. They have this capability in large part because of federal assistance received after the District Court's decision. The decision thus precipitated a type of "affirmative action" program, assisting Indian fishermen to acquire the technological capability to increase their fishery harvest. That program has been beneficial by helping remove the real root of the Indian fishing problem, the inability to compete because of the lack of modern gear.

This, however, does not in any way validate the lower federal courts' definition of the Indians' treaty right — and it is that definition which is the core of the controversy.

ARGUMENT

I.
INTRODUCTION

The duration and the complexity of this controversy seem to be matched only by the tenacity with which the competing fishing groups have asserted their conflicting positions. A newer element, the bitterness with which the non-Indian commercial fishermen have received the district court decision, is based on the fact that the decision will bankrupt many of those commercial fishermen and drive them out of their traditional calling.[1] These attitudes have understandably made it difficult to confront and to resolve the basic legal issues presented in this controversy. Yet, those issues cry out for a resolution.

The acromonious effect of the litigation is starkly reflected by the overall tone and the specific charges of treaty violations which fill the tribal and supporting amicus briefs. Those briefs characterize the state of Washington as the last bastion of a deliberate program to deprive the Indian population of clear and explicit treaty rights.[2] Not only do we deny that allegation but; How can any objective observer say that we are here involved with "clear and explicity" treaty rights? The questions is how very general treaty language should be construed.

---

[1]The primary non-Indian marine fishing areas in Puget Sound for Puget Sound stocks are Areas 6B, 8B, 8C, 9, 9A, 10 and 11. In those areas prior to the district court decision (1970-1973) there was an average of 45 days of fishing for gillnet and purse seine commercial fishermen. Since the decision (1974-1978) the average has been reduced to 5 days per year with only one day in 1975.

Those areas generally begin in Discovery Bay near Port Angeles and run southerly through Admiralty Inlet to Everett then by Seattle and down the East and West Passes.

[2]Those amicus briefs do show how unrealistic it is to characterize the tribes as a politically impotent minority. In fact, the tribes are supported by a legion of powerful social and political forces which have but one common trait: They have not interest which will be adversely affected by the decision which they seek; they can occupy what they assert to be a lofty moral ground at absolutely no cost to themselves. That cost will be exclusively borne by the non-Indian commercial fishermen and their communities.

The charges of racial discrimination are not supported by the exhaustive findings and conclusions of the trial court in its 1974 decision. The State of Washington has historically done no more than to manage its fisheries on the premise that the "in common with" language of the treaties reflects and incorporates equal protection principles comparable to those embodied in the United States Constitution. (See U.S. v. Wash. 520 F.2d 676 at 685 (9th Cir 1975) and F.F. 213; Joint App. 177 hereinafter cited as JA).[3]

When this court decided *Tulee v. Washington*, 315 U.S. 681 (1942), the State promptly acquiesced, and since then has not required treaty Indians to acquire a state commercial license nor to pay a landing tax while engaged in their treaty fishery. (F.F. 32, JA 114) In addition, the State Department of Fisheries had undertaken efforts to increase the volume of fish available to treaty Indians prior to the decision in this action and had a cooperative relationship with several tribes. (F.F. 210, 212; JA-176, 177) Prior to the decision, the State had provided a number of special off-reservation Indian tribal fisheries not available to non-Indians. (F.F. 210, JA-176) And finally, when this Court first decided in *Puyallup II*, 414 U.S. 44 (1973), that a specific allocation of steelhead was necessary under certain circumstances in the Puyallup River fishery, the Washington Department of Game, which manages steelhead, promptly promulgated regulations for a special Indian net fishery. That allocation was explicitly approved by this Court in *Puyallup III*, 433 U.S. 165 (1977).

[3]In the district court's opinion, 253 Findings of Fact and 26 Conclusions of Law, there are only 10 Findings of Fact which might be construed as reflecting any discriminatory pattern directed against treaty Indians. F.F. Nos. 33, 70, 117, 158, 193, 194, 195, 222-224 (JA 114, 128, 144, 158, 170, 171, 181-182). With the exception of a single reference to non-Indian lawlessness in F.F. 70, these findings simply show that the State made arrests and seized Indian fishing gear in response to violations of State fishing regulatins. Those state actions applied the same set of rules to Indian off-reservation fisheries as to non-Indian fisheries. The fact that similar citations of non-Indians were much more numerous is not noted by the court because, of course, they were not relevant to the construction of the treaties.

In stark contrast, *after* this Court had rendered its decision in *Puyallup II, supra*, the district court criticized this Court's rationale in that decision,[4] and ignored the factors which this Court instructed the State to consider in any allocation of the fishery. The district court determined, of course, that the treaty mandated a single allocation, 50% plus for the tribes, no matter what the circumstances or the equities in any given situation.

Contrast also the position of the State with that of the United States which here represents the Indian tribes. The United States has exclusive control over most of the ocean fishery,[5] a fishery profoundly affecting the return of anadromous fish to Puget Sound. Federal regulation of that fishery barely recognizes the existence of the tribes or the treaties, much less the construction of those treaties for which it argues here. The United States, with its management control of the ocean fishery, have sought to place the primary burden of providing for an Indian allocation on the non-Indian commercial fishermen who have historically fished on Puget Sound, far from the open ocean.

Both the United States and the tribal briefs criticize our characterization of the Indian's share under the district court's decision as being "50% plus." In fact, for many of the non-Indian fishermen that description greatly understates the Indian share. The actual allocation of the commercial coho net fishery in Puget Sound which is reflected in a regulation of the State Department of Fisheries for 1977 required by the district court's

[4]The district court, after discussing the decisions of this Court culminating in *Puyallup II, supra* (JA 75-80) declared,

> "* * * To the present time there never has been either legal analysis or citation of a nondictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties * * *" *U.S. v. Washington*, 384 F.Supp. 312, 338 (1974 USDC, W.D. Wa.) (JA-80)

[5]Pursuant to 16 U.S.C. 1801, federal jurisdiction commences three miles offshore. Most of the ocean fishing activity occurs in that "federal area." W.D.F estimates that 90% and 85% of the troll-caught coho and chinook salmon, respectively, are taken outside the three-mile limit.

allocation, and enjoined by the State court in *Puget Sound Gillnetters v. Moos*, 88 Wn. 2d 677, (1977), Ex. G, was 557,000 fish for treaty fishermen and 146,000 fish for nontreaty commercial fishermen.

The primary reason for this extraordinary disproportionate allocation was the substantial harvest in the federally controlled commercial fishery in the open ocean.

The practical effect of the 50% plus allocation is an extraordinary economic windfall to the treaty Indian fishermen in a commercial fish market which developed nearly 40 years after the treaties.[6] They are not required to compete on an equal basis with the non-Indian commercial fishing industry. They have a huge "leg up" on their competitors. They have a guaranteed catch, protected from the hazards of bad luck or aggressive competitors. To be precise, they are protected from having to compete at all with non-Indian fishermen; for the non-Indian fisherman must frequently stay off the waters completely while Indian fishermen catch their court decreed allotment.[7]

This is, of course, the major source of the bitterness of the non-Indian fishermen; instead of competing with the Indians, they must often stay in port, losing the opportunity to pursue their livelihood, while the treaty Indians are permitted to harvest the available fish. The non-Indian fishermen do not have, to use Judge Kennedy's phrase, "the right to a fair opportunity to compete."[8] The denial of that right to the non-Indian fishermen is the direct and inevitable consequence of the

[6]See footnote 11.

[7]For example, in the 1978 IPSFC fishery by purse seiners, Indians received 18 days compared to 11 for non-Indians. During the four weeks upon which the Indians' extra days were added at the beginning of the harvest period the Indian purse seiners averaged 2,500 salmon for those particular weeks. That translates into in excess of $40,000 at wholesale fish prices, a substantial portion of which was caught while non-Indians were required to stay on shore.

[8]Puget Sound Gillnetters Ass'n v. U.S. Dist Court 573 F. 2d 1123, concurring opinion at 1136 (9th Cir 1978) (Pet. No. 78-119, A-28).

lower court's allocation of the fishery. Ironically, even under such a discriminatory system, and even in 1978 while the allocation was being enforced exclusively by federal agencies, one-third of all the arrests for illegal fishing were of treaty Indians, who still represent considerably fewer than one-third of all of the fishermen.[9]

The roots of the bitterness can be understood only by focusing upon the principal issue in this case. The United States and the tribes to the contrary, that issue is not the failure of the State to recognize the right of treaty Indians to fish for subsistence and ceremonial purposes.[10] That right exists and was within the reasonable expectations of the Indians at treaty times. Any State regulatory system must accommodate this catch. It is only when these and substantial reservation catches are effectively added to the Indian 50% allocation does it contribute to the problem.

Nor is there at stake in this litigation a challenge to the right of the Indian tribes to participate, in some manner and to some extent, in commercial fisheries. That right, too, is beyond question. *Puyallup II, supra.* The core of the controversy is the extent of that treaty right. Do the treaties give the tribes or their members the right to a separate non-competitive commercial fishery? What division of the present commercial fishery, if any, is mandated by the treaties? What were the reasonable expectations of the Indians at the time the treaties were

[9]A representative of the United States National Marine Fisheries Service enforcement branch and a United States Coast Guard representative each testified to this proportion, citing specific numbers of violations by each group. The specific reference was that 55 of the total 177 violators were Indians. (Tr. November 3, 1978, pp. 14, 25)

[10]The suggestion that non-Indian fleet takes home "as much as 5% of the run" (U.S. Br., 76) is false. That would amount to approximately 400,000 fish per year. The "citation" of authority for that statement (Tr. April 6, 1978, p. 183) discloses that the tribal witness testifying had no basis for his simple guess of 5%.

signed with respect to the present commercial fisheries, which did not even exist at treaty time.[11]

The single most important question in this controversy can be stated simply: Is the present huge commercial fishery harvest[12] to be divided on some basis other than an

[11]At trial, the chief anthropological witness for the United States, Dr. Barbara Lane, could make no quantitative comparison between the commercial Indian catch at treaty time, and the present commercial fishery. (Sept. 5, 1973, Tr 1779 and F.F. No. 7, JA 102) An economist for the tribes, Dr. Robert Thomas, though providing estimates for the Indian subsistence catch, shows no commercial catch at all until approximately 1865. For the reasons explained by Dr. Thomas, one can only surmise that the Indian commercial catch was very small. As stated by Dr. Thomas:

> "* * * any expansion of the fishery was limited by primitive techniques of food preservation available. Salmon could be dried, salted, smoked in the style of the Indians, or pickled in brine. Although there is evidence of shipments to South America in the late 1840's and to the Hawaiian Islands during the 1850's, *most long distance transport left the fish unappetizing. Due primarily to the sparse settlement of the Western states in the mid-nineteenth century, any large development of the industry awaited more rapid transportation facilities and, far more important, better means of preservation.*"
>
> The development of the vaccum sealed metal can fulfilled the latter requirement, and in doing so revolutionized the perishable food industry. (Ex. MLQ 1, p. 1) (Emphasis supplied.)

Dr. Thomas further observed that the large scale development of canning fish in Puget Sound did not commence until the mid 1890's.

[12]From the briefs and record in this case, one might form the impression this controversy involves only salmon and steelhead. It must be noted, however, that the district court has extended its orders to other species of fish, such as herring roe. That fishery, now worth millions of dollars, was developed exclusively for a recently created market, primarily in the Orient, where the roe is sold as caviar. Such a market did not, of course, exist at treaty times.

open, nondiscriminatory fishery? What are the treaty rights of the Indian tribes with respect to *this* fishery?[13]

This court provided the starting point for answering this question in *Tulee v. Washington*, 315 U.S. 681, 684 (1942), in which it stated:

> * * * the treaty leaves the state with power to impose on Indians *equally with others* such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. (Emphasis supplied.)

This proper starting point, "equally with others," was even more explicit in *Puyallup I*, 391 U.S. 392 (1968), when the case was remanded to the State Supreme Court for a determination of *"the issue of equal protection implicit in the phrase 'in common with' as used in the Treaty."* (*Supra*, at 398) (Emphasis supplied.)

It was on this equal protection standard which the Court applied in *Puyallup II*, *supra*, to strike down Washington's ban on all net fishing for steelhead. As stated by the Court:

> "Whether that [ban] amounts to discrimination under the Treaty is the central question in these cases." (*Supra*, at 47)

The State rests its case on the equal protection principles inherent in the treaties themselves and not on

[13]Admittedly, while increasing population and technological advances created a market for a substantial commercial fishery, that technology has increased the cost for necessary equipment. The State banned commercial fish traps which were owned by large companies and designed its regulatory pattern to encourage a fishery by small private entrepreneurs. While Indians have always had legal access to this fishery, for some Indians economic considerations have made it difficult to participate fully. But the record clearly shows that notwithstanding those economic considerations there were a number of Indian fishermen at the time of the trial. (F.F. No. 188, JA 168) Some of these fishermen had commercial boats in excess of 36' in length. (F.F. No. 67, JA-126) To the extent that economic considerations have restricted Indian participation in the fishery, that problem can be, and to a certain extent has been, met by the United States fulfilling its trust responsibility by supplying Indians with fishing gear effective enough to make them truly competitive.

either the Fifth or Fourteenth Amendments. It is the treaty language itself which incorporates these equal protection principles as shown in the *Puyallup* series.[14]

Decisions of this Court commonly have settled even the most divisive of controversies, and thereby commenced a healing process. The issue of the meaning of the treaty language is now squarely before this Court, and it should be decided here. This Court's decision on the merits is desperately needed in order to restore the public consensus necessary to protect the fishery resource, to implement an effective fishery management system, and adequately to protect the interests of all fishermen, both treaty Indians and others.

Nevertheless, both the United States and the tribes seek to avoid a decision by this court on the basic issue. And understandably so. An examination of their submissions, we believe, will indicate clearly that the lower court's reading of the treaty language, and the division of the fishery based upon that reading, cannot withstand this Court's scrutiny.

[14]To the extent we suggested in our opening brief (Wash. Br. 89) that the Fourteenth Amendment may have direct application in this controversy, we were incorrect or at least imprecise. If the treaty language had explicitly said: "The Indians are secured the right to half of the fish harvestable in their usual and accustomed fishing grounds," that language would have been immune from a constitutional equal protection challenge. But the language does not say that; instead, its terms incorporate the equal protection principles of the Fifth and Fourteenth Amendments.

II.

NEITHER THE DOCTRINE OF RES JUDICATA NOR ANY OTHER DOCTRINE OF FINALITY PRECLUDES THIS COURT FROM CONSIDERING THE CENTRAL ISSUE, THE MEANING OF THE "IN COMMON WITH" LANGUAGE

In his submission to this Court on the question of whether the writ of certiorari should be granted, the Solicitor General stated:

> "The central issue in these cases is the proper interpretation of the treaty language guaranteeing the tribes the 'right of taking fish, at all usual and accustomed grounds and stations, * * * in common with' other Washington citizens." (U.S. Br., on Pet. for Cert. 21)

We agree.[15] The proper interpretation of that provision is the key to determining whether the District Court's formula for dividing the fish is proper. That division is the foundation from which all of the other problems involved in this controversy flow, including IPSFC fishery and the myriad of enforcement problems. As the Solicitor General correctly observed, it is "the basic allocation decision underlying all of the subsequent proceedings in the case." (U.S. Br. in Response to Pet., 46) The Solicitor formulated six broad questions, encompassing the full merits of this controversy (U.S. Br., *supra*, 3-4), and supported certiorari on all of those questions except the IPSFC fishery (U.S. Br., *supra*, 27). He summarized his position: "* * * in the hope that this controversy may be finally resolved without years of continued litigation, we suggest that the Court should *consider and decide* the enforcement questions as well as *the underlying question of treaty interpretation.*" (Emphasis supplied)(U.S. Br. *supra*, 25)

[15]We do not agree, however, that the guarantee runs to the tribes as such rather than to their members. See, *United States v. Winans*, 198, U.S. 371, at 381 1904), and pp. 34-39, infra.

In granting certiorari, this Court did not limit or restrict the questions presented and presumably intended to review this central issue fully, at the urging of both the Petitioners and the Solicitor General, and against the contrary urging of the tribes. The Solicitor General has changed his mind. The Solicitor General is now saying in effect: "Consider and decide only the enforcement questions. Just affirm the lower court's division of the fishery; but do not consider or decide the underlying question of treaty interpretation." (U.S. Br., 46-53) It is clear from the Solicitor's brief that the decision to seek to avoid the merits of the controversy is dictated by his discovery of a paucity of authority to defend that 50% plus allocation decision on its merits.

A. The Unsuccessful Judicial Quest for a Rationale Supporting the District Court's Formula for Dividing the Fish

This court is presented here with an unusual situation—a clear result, but no clear rationale for that result.

As we have noted (State Br., 54), the district court based its conclusion exclusively on a portion of Webster's dictionary definition of the word "common." The result was a specific formula for dividing up the fish according to the 50% plus allocation. As we have also seen, the Court of Appeals abandoned the district court's rationale for that result and found a new one; i.e., exercise of discretion by the trial court. (State Br., 39) No brief filed in these cases defends that dictionary definition rationale. Neither the United States nor tribal brief even quote it.

In its first decision, the Circuit Court analogized the rights of the Indian and non-Indian fishermen to those of co-tenants. (U.S. v. Wash. 520 F.2d 676 at 687-88 (9th Cir 1975)) (JA 49, 50) The court, however, went on to treat the actual 50% plus allocation as an exercise of *discretion*, concluding that "* * * the [district] court's apportionment was well within its discretion." *Supra* at 688 (JA 52). But the district court, of course, had not exercised any form of discretion.

In the decisions which are the immediate subject of this appeal (573 F. 2d 1118 and 1123, App. Pet. for Cert. No. 78-119, A-1 and A-29), Judge Goodwin, while reemphasizing the co-tenancy analogy as the basis for apportionment, also relied on the discretionary nature of the apportionment. He approved the district court's division—for 1977 only—of 55% for non-Indians and 45% for Indians. *Supra* at 1129 (Pet. No. 78-119, A. 12)[16]

Defining the limits of this judicial discretion is impossible. The exercise of that discretion was apparently activated by the district court finding that the State violated the treaties. But how, according to the lower courts, did the State violate the treaty? Apparently by failing to give the Indian fishermen at least the 50% plus division found by the district court to be mandated by the treaties. Thus, the division is not simply a remedy; it defines the right as well and is the standard by which State action is to be measured. Yet the lower courts felt that they—though apparently not the state—in the exercise of discretion, could disregard the 50% plus formula.

Small wonder that Judge Kennedy, in his concurring opinion, stated:

> "* * * the court undertakes to restate the rationale for the apportionment rule of our earlier decision, and I find it necessary to suggest that the explanation of

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[16]Even the District Court wavered on the question of whether its division was legally required, or discretionary. When it stated:

> "* * * economic disruption associated with implementing the 1974 decree is not legally cognizable." (C.L. No. 4, June 6, 1978, Pet. 78-139, C-10)

it obviously viewed the division as nondiscretionary. Yet, for the 1977 fishing season—but only for that season—it had allowed a 55%-45% division. The controlling factor seems to be whether the United States requests the exercise of discretion. In 1977 the United States did request in 1978, it did not.

this critical point remains somewhat obscure."[17] 573 F. 2d *supra* at 1134.

After reading the various briefs submitted by the Solicitor General and the Tribes, the explanation still remains obscure.

For the Solicitor General, that explanation seems to be found in yet another source—the concept of the "reasonable needs of the several Tribes." (U.S. Br., 72; cf., U.S. Br., 65-72)

The tribes likewise appeal to argue a "reasonable needs" standard (Tribal Br. 150-160)[18] while sprinkling in a good dose of the co-tenancy theory. (Tribal Br. 161, 168)[19] The tribal brief at 159 refers to the average income derived by participants in the Indian fishery. Are the tribes contending that if the Indians participating in the fishery increases in the future, then the Indian share of the total allocation must be correspondingly increased?

We shall examine in detail the explanations offered by the Solicitor General and the Tribes, *infra*, at pp. 34-39 . Here we simply note the obvious: There is a result—the District Court's division—vainly searching for a legal rationale.

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[17]Judge Kennedy then proceeds to an analysis of the concept of co-tenancy, noting that "* * * the concept * * * does not help the court determine what share of the disputed rights should be allocated to each of the parties." *Supra* at 1135 (Pet. No. 78-119, A-26) He further concludes (*supra* at 1136, Pet. No. 78-119, A-28) by recognizing the critical difference between "the right to a fair opportunity to compete" and the "rule of fifty percent apportionment," clearly indicating his preference for the former, but his reluctant acceptance of the latter under the principle of "law of the case." Judge Wallace shared Judge Kennedy's difficulties with the underlying rationale, but likewise felt bound by the Circuit Court's previous decision. (See, *573 F.2d supra at 1126*) Thus, only Judge Goodwin was left to support the co-tenancy rationale.

[18]The Tribes use the term " 'fair needs of the tribes" to express the standard. (Tribal Br. 160)

[19]The Tribes are somewhat ambivalent in their use of the co-tenancy theory; although they rely on it, they believe that "both the Petitioners and Judge Kennedy took the Ninth Circuit co-tenancy analysis *much too literally.*" (Emphasis supplied) (Tribal Br. 167, noted 394)

Yet the Solicitor General and the Tribes urge this Court simply to affirm the result,[20] without examining its correctness and without addressing the meaning of the "in common with" language. That they should urge such avoidance is understandable: It reflects the shakiness of the various rationales which they and the courts below have offered to date. To argue that the district Court's division should be upheld, without examining the legal basis for the division, is itself an indication that the legal basis is unlikely to withstand scrutiny by this Court.

B. The Res Judicata Argument of the Tribes.

In attempting to preclude review of the central question, the Tribes and the Solicitor General take different approaches. The Tribes argue that the doctrine of res judicata bars an examination of this question by reason of this Court's previous denial of certiorari. The Solicitor General, in contrast, does not rely on this doctrine—and for very good reason: The Tribe's reliance on the doctrine is completely misplaced; and the Solicitor General tells us why:

> Neither the doctrine of *res judicata* nor law of the case would appear to prevent this Court from making a determination on the merits of the treaty issue in the Washington Fishery case. *See Mercer v. Theriot*, 377 U.S. 152, 153-154; *Reece v. Georgia*, 350 U.S. 85, 87. As stated in *Reece v. Georgia, supra*, 350 U.S. at 87, this Court has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation,' notwithstanding the fact that such questions became the law of the case, insofar as the lower courts were concerned, upon denial of the first petition for certiorari filed by the State. (U.S. Br. on Pet. for Cert., p. 22, n. 17)

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[20]We are not unmindful that we recently presented an argument somewhat similar to that made by the Tribes. See, *Washington v. Yakima Indian Nation*, Slip Op., Janaury 16, 1979, pp. 12, 13, n. 10. Our argument was that the principle of stare decisis precluded this Court from considering the merits of an issue which had previously been decided by the Court in other cases, through summary affirmances or dismissals. However, this Court, recognizing the importance of the issue, examined the merits fully. The same approach should be taken here where the court has never previously decided the issue.

Procedurally, *Mercer v. Theriot*, 377 U.S. 152 (1964) is indistinguishable from the Washington Fishery case, *Washington v. United States*, No. 78-119. The procedural setting in *Mercer* was described as follows in *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365-366 (1973):

> * * * Similarly, in *Mercer v. Theriot*, 377 U.S. 152, * * * a diversity action for wrongful death, certiorari was initially denied after the Court of Appeals had set aside the jury verdict on the grounds of various trial errors and insufficiency of the evidence. On remand, the District Court denied a motion for a new trial and the Court of Appeals affirmed. We then granted certiorari and reversed because the trial errors did not affect substantial rights and the evidence at the trial was sufficient to sustain a verdict in petitioner's favor. * * *

We turn, then, to the assertion of the Solicitor General that this Court in the exercise of its discretion should not review the central question.

C. The Finality and Comity Argument of the Solicitor General.

The Solicitor General asserts that "reopening the basic decision" would be "wasteful and potentially disruptive," and would imperil "the precarious accommodation now achieved." (U.S. Br. 58) The accommodation is indeed precarious; the "working plan" which the Solicitor General wishes to preserve (U.S. Br. 58) is not working at all, as it admitted in the very next paragraph of the Solicitor General's brief. For the paragraph assails what it characterizes as "* * * flagrant disobedience of outstanding orders and the irresponsible intervention of the state courts."[21] (U.S. Br., p. 58) That is hardly a description of a "working plan" or of any "accommodation."

[21] As previously noted, infra, p. 9, even in 1978 when enforcement of the allocation was by federal officials, one-third of the violators were Indians even though substantially fewer than one-third of the fishermen are Indians.

All parties desire an end to these proceedings. Only a full consideration of the central question is likely to achieve that finality.

Further, full consideration of the merits will promote finality in other important respects, as well. For example, in order to avoid protracted litigation of the sort which has occurred in this controversy, the State entered into a five-year settlement agreement for the Columbia River fishery. (*United States v. Oregon*, 302 F. Supp. 899 (Ore. 1969). That five-year period reflected the hope that by the time the agreement expired, this Court would have resolved the present controversy on its merits, and would thus facilitate a resolution of the Columbia River controversy. Clearly, if the merits are not addressed now, the same question will have to be dealt within the context of the Columbia River fishery.

As the tribes have pointed out (Tribal Br. 248), the question of whether hatchery fish are to be included in the division has not yet been resolved by the district court, although in the interim such fish are being included in the division. If this Court determines that an allocation of fish is not required by the treaties, that decision will render unnecessary further consideration of the status of hatchery fish because there would then be an equal opportunity fishery upon all fish, whatever their source. Conversely, a decision by this Court that some form of allocation is required will provide guidance to the lower courts in resolving the hatchery fish question—guidance which is lacking now. And, like the Columbia River question, the hatchery question may provide another request to have this Court review the central issue in this litigation if it is not considered now.

The Solicitor General asserts that the state, along with the non-Indian fishing associations, "cannot remotely suggest that they have not had their day in court." We make no such assertion. Every litigant in this Court has already had a day in court elsewhere. We simply agree with the Solicitor General's position in the United States brief on petition for certiorari. There, he supported certiorari because of the fundamental conflict between the

state and federal courts and the resulting breakdown in the enforcement of fishing regulations. U.S. Br., in Response to Pet., p. 19. That conflict is best solved by dealing with what the Solicitor General recognizes as "the underlying treaty issue." (U.S. Br. *supra*, p. 19) Only such a decision will truly promote finality.

The Solicitor General also suggests that giving us a day in this Court would "reward illegality.[22] But of what "illegality" does the state stand accused, as contrasted with some individual private fishermen? None. The record clearly shows that the state's executive agencies promptly adopted regulations to implement the district court's decisions, only to be frustrated by state court decisions which we, and not the United States, have brought before this court.[23]

Finally, the acts of "illegality" of which the Solicitor General speaks are manifestations of the polarization and bitterness which has developed in this long controversy. Only a full consideration of the merits can break through that polarization and start the healing process of bringing the parties together.[24]

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[22]The whole thrust of the Solicitor General's argument seems to be that by reason of the state's efforts to bring this controversy to this Court for its resolution, that the State has rendered itself in some way unworthy of receiving a decision from this court. This suggestion, in our view, is unworthy of our federal government.

[23]Indeed, when faced with the state court actions, the state requested the United States and the tribes to intervene and finally sought to interplead them. They resisted, successfully, on immunity grounds.

[24]For the foregoing reasons, the merits should be addressed even if the Solicitor General is correct in his assertion that under the doctrine of res judicata "the state court judgments now here on certiorari ought never have been entered." (U.S. Br. 59) Accordingly, in our view, it is unnecessary to determine whether that assertion is correct.

III.
THE ACTUAL TREATY INDIAN HARVEST

Some briefs have observed that treaty Indian fishermen are harvesting less than the "50% plus" division which we have previously criticized. (U.S. Br., p. 72, et. seq.; Tribes Br., p.72). Those observations are accurate.[25] The percentage of salmon landed in Washington, reported as caught by treaty Indians, is less than the 50% plus. The calculation of present share asserted in those briefs, however, includes the ocean catch of fish from Washington, Oregon, Idaho, California and Canadian streams in the base to which the Indian catch is compared. The Indian treaty entitlement, as enunciated by the 9th circuit, does not extend to many of those fish which would not return to Indian fisheries if they were not caught by Washington fishermen in those waters. The percentage references in those briefs, therefore, are so underestimated as to be meaningless.

We readily concede that the Indian fisheries have not yet taken all fish to which the District Court has held them entitled. The reasons are many-fold. The size of the Indian fleet is smaller than the non-Indian, though growing. The United States' regulation of the IPSFC fishery, as we indicated, State's Br., p. 71, targets an Indian catch of 10-15%, rather than 50%. Tribal restrictions on fishing activities by tribal members also reduce catch. Some tribes even prohibit the use of purse seines, the most effective gear. Nevertheless, the impact of the decision on the Puget Sound fishery has been overwhelming.

It is important to note that the "usual and accustomed fishing grounds" as defined by the district court are so extensive as to include all case area waters of the State of Washington in which commercial fishing

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[25]However, treaty Indian fishermen have caught their 50% plus from Puget Sound origin stocks in 1977 and 1978.

occurs. See; *U.S. v. Wash.* 459 F. Supp. 1020 at 1048, 1058 and 1067 (1978). The district court also has been lenient in allowing tribes to establish or expand their usual and accustomed grounds and stations:

> "In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Little documentation of Indian fishing locations in and around 1855 exists today." (*U.S. v. Washington,* 459 F. Supp. at 1059.

Indeed, the District Court does not require the tribes to establish usual and accustomed grounds and stations. Rather the state must disprove them:

> The absence of a determination that a specific fishing area is a usual and accustomed fishing place of a particular tribe shall not preclude the tribe or its members from exercising treaty fishing rights at such location if opened under a tribal regulation filed pursuant to paragraph 1 of the Interim Plan, subject to the state's authority to contest the location consistent with prior judgment and orders of this court. (459 F. Supp. at 1042)

The importance of the extent of these areas is that the treaty rights, whatever they may be, effectively extend to all areas within the Washington waters embraced by this litigation in which commercial fishing occurs.[26] We are not contesting the broad determination as to usual and accustomed grounds; such breadth simplifies the complicated legal issues and management problems. But, by virtue of that determination, the only governmental entity which has control over the fish before they reach the usual and accustomed grounds is the federal government pursuant to the Fishery Conservation Management Act.

[26]The breadth of the geographical areas found by the court to be usual and accustomed grounds belies the suggestion of the Solicitor General that this case primarily involves fishing rights in rivers and river mouths. (U.S. Br. 62) The Solicitor's suggestion may reflect the common concept that such grounds were limited areas, but that is not the understanding of the District Court.

As we have previously noted, the Indian harvest is being incrementally increased to reach the full entitlement of the 50% plus allocation. The tribes, of course, would never argue that by failing to take the entire entitlement they would somehow legally lose it.

The lower court's allocation of the fish resource is cast as a right which will continue to exist even if all Indian fishermen retired from fishing to become lawyers. The entitlement would exist and could be reasserted at any future date. In determining the extent, as well as the existence of entitlement, the amount of actual fishing by Indians at any given point of time was considerd by the court to be irrelevant. It is thus irrelevant in defending the court's rationale in arriving at the allocation formula.

The district court, moreover has provided that the tribes can obtain an increase in their allocation for a subsequent fishing year when they have not caught their full share in a preceding year. (JA 593) Such requests have been made and are now pending with the district court.

Let us examine how the division has actually operated.

Before the state courts became involved in the controversy, the District Court's division was implemented through Department of Fisheries' regulations. Such a regulation is found in Exhibit G in *Puget Sound Gillnetters v. Moos,* 88 Wn. 2d 677, here under review in No. 77-983. As also shown in the record in that case,

> Those regulations, based upon anticipated returns, were developed to provide *nontreaty fishermen* fishing in Puget Sound commercial fisheries with *146,000 fish and treaty fishermen* with *557,000 fish* to be harvested in Puget Sound commercial net fisheries. (JA 27)

After the state courts effectively deprived the Department of the authority to implement the District Court's order, this function shifted to the court created Fisheries Advisory Board.

That Board starts with initial estimates, as shown in the table for "1978 Puget Sound Coho" found at JA-613.

Once the ceremonial and subsistence catch is set aside the application of the district court's formula is simple. Using that table with the Straits of Juan de Fuca as an example, the Indian entitlement is half of the total harvestable number of coho; i.e. half of 43,600 or 21,800. However, under the court's formula, the prior troll and sport interceptions of the equivalancy of 16,000 adult fish are subtracted from the non-Indian entitlement, so that only 5,800 fish (21,800 less 16,000) are available to the non-Indian Puget Sound fishermen. Thus, of the fish available for a Puget Sound net fishery, (27,600) 21,800 are reserved for the Indian fishery and only 5,800 for non-treaty fishermen.

Using another example from the same table; Hood Canal run of Coho, the total available for harvest is 56,100 which is divided 11,500 for the non-Indians and 44,600 for the Indians. The court uses those figures to set the numbers of fishing days for the Indian and days for the Non-Indian fleets.[27]

Thus, the non-Indian fishermen in Puget Sound are caught in a vise, with the District Court providing one arm of the vise and the United States executive branch the other. By virtue of the District Court's orders, the number of fish they can catch is directly dependent upon how many fish the United States executive branch allows to be caught before they enter Puget Sound waters. To the extent that the executive branch allows a substantial ocean fishery, the impact is borne, under the District Court's order, solely by the non-Indian fishermen in Puget Sound. By application of the vise, non-Indian fishermen can be squeezed off the Sound, and have been totally removed from some fisheries already.

As refelected by the tribal brief, Indian fishermen are not yet catching their full entitlement in some areas, but there is every indication that it will happen. The mechanisms for bringing it about are already in place. The

[27]These figures, and the numbers of allowable fishing days, are continuously readjusted. An example is found in the September 21, 1978 report from the Chairman of the Board to Judge Boldt. (JA 614-616).

number of Indian fishermen and the amount of their gear is growing. In 1974, there were fewer than 800; by 1978, this had grown to over 1,200.

We are not suggesting that this growth is bad; indeed, for reasons we shall discuss subsequently, it is a welcome development. For it gives the Indians the capability to compete effectively with the non-Indian fishermen. And lack of this capability has been the root of the whole problem all along. (Cf., pp. 49-52, infra.)

Rather, our point here is simply this: To the extent the Indians are not catching their full entitlement in certain areas, there is no reason to believe that they won't be catching it in the foreseeable future.[28]

[28]The most obvious example of an area where the Indians are not catching their full entitlement is in the IPFSC fishery. (Cite)

IV.
FAR FROM SUPPORTING THE 50% PLUS DIVISION OF THE LOWER FEDERAL COURTS, THE PUYALLUP DECISIONS SHOW WHY THAT DIVISION IS WRONG

The Puyallup decisions are the most recent by this Court on the subject of Indian fishing rights. All parties, not surprisingly, use them to justify their position. Thus, they require a full examination.

Such an examination will show that the proper standard against which the State's management of the commercial fishery should be tested is not the 50% plus standard. Rather, it is a much more flexible standard, based upon conservation needs and — most importantly — equal protection principles. It is a standard which can take relative numbers of fishermen into account, and can allow for a truly competitive fishery.

Our examination involves two questions. We here take up the first.

A. Do the Puyallup decisions require a numerical allocation or apportionment for the salmon fishery?

The Solicitor General contends that the Puyallup decisions require a numerical allocation or quota system for the marine salmon fishery.[29] Such a system was, of course, found appropriate in the river fishery involved in those decisions. Let us see if it is likewise required here, as the Solicitor General contends.

The Puyallup decisions involved steelhead, which the Washington legislature had placed in a special category. It had classified steelhead as a game fish, and it had forbidden both the use of nets for catching game fish and the sale of such fish once caught. (See RCW 77.08.020 and

[29]As the Solicitor General put it: "These precedents would seem to foreclose the debate whether *some* form of apportionment between Indian treaty fishermen and other fishermen is appropriate in the conditions." U.S. Br., p. 69.

77.16.060) Steelhead, in short, were to be treated like trout — of which they are a species.

This Court overturned that legislative decision as applied to Indians. The reasons for doing so cast light on the present problem.

In *Puyallup I, supra:*

> "We found the state court decision had not clearly resolved the question whether barring the "use of set nets in fresh water streams or at their mouths" by all, including Indians, and allowing fishing only by hook and line in these areas was a reasonable and necessary conservation measure. The case was remanded for determination of that question and also "the issue of equal protection implicit in the phrase 'in common with'" as used in the Treaty. (*Puyallup II, supra,* at 45)

In treating both the conservation question and the equal protection question in *Puyallup II*, this Court found the unique facts of the steelhead fishery to be critical. The facts were these: The non-Indian sport fishery was catching all the available steelhead; i.e., all that could be caught without cutting into the number needed for escapement. The State Supreme Court had used these facts as justification for the closure of the Indian net fishery. In the words of this Court:

> The Supreme Court of Washington * * * held * * *
>
> "that the prohibition of net fishing for steelhead was proper because the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river. Id., at 573, 497 P2d, at 178-179." (*Puyallup II, supra,* at 46)

But the very fact pattern which, in the view of the state court, justified the prohibition, supplied this Court's reason for overturning it:

> The ban on all net fishing in the Puyallup River for steelhead *grants in effect the entire run to the sports fishermen.* Whether that amounts to discrimination under the Treaty is the central question in these

cases. (*Puyallup II*, *supra*, at 46, 47) (Emphasis supplied.)

In finding just such discrimination under the treaty, this Court in *Puyallup II* took into account another obvious fact: the state had available another alternative for conserving the steelhead run and providing the necessary escapement — an alternative to placing upon the Indian fishery alone the entire burden of providing the necessary escapement while permitting the continuation of the non-Indian river fishery. It could divide that burden.

Though neutral on its face, the Washington steelhead system had a severely discriminatory *effect*. The state had an available alternative for taking care of conservation needs, while eliminating that discriminatory effect: apportionment. Hence, conservation needs could not justify the Washington system and it was accordingly struck down. The state promptly made such an apportionment, and it was approved by this Court in *Puyallup III*, 433 U.S. 165 (1977).

Three points should be noted here. First, in managing a fishery, the state typically has available to it various alternatives to meet conservation needs. The Puyallup factual pattern provides an example in its simplest form. In choosing between alternatives, the controlling legal consideration is, as shown again in *Puyallup II*, the principle of equal protection or nondiscrimination. The critical question is: In order to meet escapement needs, has the state chosen a discriminatory alternative when a nondiscriminatory alternative is available to meet those same needs?

Secondly, *Puyallup II* shows the special nature of the Indian treaty right, which is, as determined in *Puyallup II*, one which embodies equal protection principles. Surely, neither a non-Indian nor, for that matter, a nontreaty Indian, could successfully challenge the state's decision to prohibit a net fishery for steelhead. If such a person were to invoke the equal protection provisions of the Fourteenth Amendment, the "rational basis" test would

undoubtedly be applied, and the challenge would fail. But the treaty Indians' challenge in *Puyallup II* was not based on the Fourteenth Amendment. It was based on the treaty. Their challenge was successful because the impact of the state's action in prohibiting net fishing for steelhead was to exclude them from the fishery entirely even though a less discriminatory alternative which would allow them to share in that fishery was available.[30]

Thirdly, the approach taken in *Puyallup II* is, we suggest, essentially the same as that taken by this Court in contexts in which governmental action is challenged as violating a constitutional guarantee. A recent example is *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The Court struck down North Carolina's system of regulating the marketing of apples on the grounds that it violated the commerce clause. The statutory system was facially neutral — as was the regulatory system for steelhead in *Puyallup*; but the Court closely examined its practical effects and found them discriminatory.

> When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and *the unavailability of nondiscriminatory alternatives* adequate to preserve the local interests at stake. Dean Milk Co. v. Madison, 340 US, at 354. (432 U.S. at 353) (Emphasis supplied.)

North Carolina could not show "the unavailability of nondiscriminatory alternatives," and hence its system was struck down. Nor could Washington make such a showing in *Puyallup II*; and hence a similar result. For, in *Puyallup II*, a nondiscriminatory alternative was clearly

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[30]So, too, in *United States v. Winans*, a non-Indian could not have successfully challenged, on Fourteenth Amendment grounds, the effective monopoly which the state had licensed the Winans Brothers to operate in the Columbia River. But a treaty Indian (or the United States) could, asserting the equal protection principles embodied in the Treaty.

available; i.e., a system of apportionment. This was the alternative ultimately adopted — and later approved by this Court in *Puyallup III, supra.*

But in *Puyallup* a numerical apportionment was, as a practical matter, the *only* alternative, because of the nature of the fishery and the fishermen. The only fishermen were Indian net fishermen and non-Indian sports fishermen. And for both groups, the fishery was exclusively a river fishery.[31] The only means of eliminating discrimination was to allocate the fish numerically between the two groups.

There are, however, two vital factors distinguishing the salmon fishery in these cases from the steelhead fishery in the *Puyallup* cases. First, unlike the regulatory pattern for steelhead, the state has always had a commercial salmon fishery on Puget Sound open to all, including treaty Indians, on at least equal terms.[32] Second, there have always been treaty Indians participating in that fishery.[33]

Even if that share is regarded as too small, or as having been reduced by state action, recently the Indian fishing fleet has expanded substantially because of the effect of the district court decisions and federal subsidies for new and more effective Indian fishing vessels and gear.[34]

The thrust of our argument so far should be made as precise as possible. We are not asking this Court to decide here that a nondiscriminatory system for the marine

[31]In marine waters, one catches steelhead only accidentally, while fishing for some other fish such as salmon.

[32]Licenses are not required of treaty Indians fishing in their usual and accustomed places pursuant to *Tulee v. Washington*, 315 U.S. 681 (1942).

[33]Even the tribal brief, at p. 54, concedes that Indian fishermen, *before* the trial, took some 5% of the salmon caught at their usual and accustomed off-reservation fishing places, places including almost all of Puget Sound. Even allowing for ocean catches, that is a greater share of the fishery per capita than that taken by non-Indians.

[34]See discussion at pp. 49-52, infra.

salmon fishery *has* or *can* be devised, without the use of allocation or quotas.[35] Rather, we are arguing that it should refrain from deciding that such a system *has not* or *cannot* be devised. That is, this Court should not eliminate the opportunity for the state to demonstrate to a lower court that such a system is in place or can be devised. The *Puyallup* decisions in no way require that this opportunity be foreclosed. We suggest that, to the contrary, they require that it be left open.

We would, of course, urge that the system be one in which all fish, as well as all fishermen, are treated equally; i.e., in which the management system does not have to take into account whether the fish are hatchery fish or natural fish.[36] The only system which can do this is one which does not use quotas or numerical allocations of fish.

We turn now to the second question. If there must be an allocation, must it be the one devised by the lower courts?

[35]Nor are we arguing that the system used for managing the salmon fishery has never adversely affected the Indian fishery in the past in violation of the treaties. No trial on that subject, based on an "equal opportunity" theory of the treaties, has even taken place. What we do know, and believe we can demonstrate to a lower court, is that the effects of any such discrimination, if it ever existed, have been effectively eliminated through the "affirmative action" program resulting from the lower court's decrees and the recent federal interest in Indian fishing. As a *temporary remedy* for such discrimination, the district court's decision has clearly been effective. It has helped remedy the real problem, a lack of Indian fishing capability. But the core of this controversy involves the correctness of the court's decision in defining a *permanent right* to a fixed share of the catch.

[36]In any system based on numerical allocations or quotas, the question of whether hatchery fish should be included or excluded from the calculations will inevitably arise, just as it did in the *Puyallup* decisions. And, just as inevitably, it must be decided. The treaty allocation before this Court in *Puyallup III*, excluded hatchery fish. 433 U.S. at 177. Strangely, the Indians did not contest this exclusion in their appeal to this Court. See, 433 U.S. at 177, n. 17.

B. If there is to be a numerical allocation or quota system for the salmon fishery, does the treaty require that the allocation be the 50% plus division decreed by the lower courts?

Again, we must emphasize that the lower court's allocation was not just a remedy; it was a definition of the treaty right as well. Can this definition stand, in light of the *Puyallup* cases? We believe that it cannot.

We have already examined this question, at pp.11-12, *infra*. The principal point of that discussion can be summarized very briefly.

In *Puyallup II, supra*, this Court stated:

> "What [allocation] formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." (*supra*, at 48, 49)

But if "rights of Indians under the Treaty" embody a right to 50% of the fish, why did not this Court just say so? Why was it deemed appropriate that all of these "variables" be considered?

The answer is simple. This Court viewed the rights of the Indians under the treaty to be based on equal protection principles, as it had previously stated in *Puyallup I, supra*, and reaffirmed in *Puyallup II, supra*. In applying equal protection principles, these variables become important. And in applying these variables, the relative number of fishermen becomes important as well.

Our argument is no more complicated than that.

The Tribes and the Solicitor General argue that the relative numbers of fishermen are irrelevant because the Indian fishing right is *tribal*. Under their submission the

right of the Puyallup Tribe, for example, to 50% plus of the fish is in no way dependent upon the number of tribal fishermen. That number can be five or five hundred. If there are only five Indian fishermen, this only means that each Indian fisherman can take 100 times as many fish as he could if there were five hundred tribal fishermen. The non-Indian share is in no way affected.

As the Solicitor General asserts:

> "The tribal share cannot fluctuate according as it is harvested by many or few." (U.S. Br., p. 66)

That statement appears in a seciton of the Solicitor General's brief entitled: "The Standard for Apportioning." (U.S. Br., 65-72) But any standard for apportioning which completely fails to take into account the relative numbers of fishermen cannot be squared with the equal protection standard adopted in the Puyallup decisions. Thus, it is not surprising that in discussing his proposed standard, the Solicitor General ignores that equal protection standard entirely, and focuses on a different subject, the asserted tribal nature of the fishing right.

Let us see if the supposed tribal nature of the right provides a way around the *Puyallup* decisions.

V.
THE TREATY FISHING RIGHT IS INDIVIDUAL, NOT TRIBAL

Respondents, in defending the 50% plus allocation, rest most their rationale for the defense on the assertion that the treaty fishing right is tribal and not individual. The Solicitor General, for example states:

> "Recognition that the fishing rights now in dispute were reserved by, and guaranteed to, the Tribes, as such, forecloses any argument for a *per capita* allocation of the fishery." (U.S. Br., 67)

But the respondents provide little basis for the assertion beyond their own *ipse dixit*. See U.S. Br., 66, Tribal Br., 197-208. Because this assertion is so critical to the respondents' position, it requires close examination.

Clearly all of the Stevens treaties reserved specific tracts of land "for the present use and occupation of the said tribes."[37] Ownership was to be in the tribes, as such, rather than in individual members. An individual member, as such, could own a portion of the land only through operation of the allotment process.[38]

Fluctuating tribal membership would not affect the amount of land which the tribe owned; that amount would remain the same[39] whether the membership changed from 500 to 5,000 or vice versa.

Respondents claim that fishing rights were intended to be treated identically. Not so.

The first problem with respondents argument is textual. There are six Stevens treaties[40] involved in this controversy. With only one material variation, they all

[37]See, e.g., Treaty of Medicine Creek, Article II, 10 Stat. 1132.

[38]See, e.g., the General Allotment Act of 1887 (24 Stat. 338)

[39]A fluctuating tribal membership with a constant amount of land in the Tribe, presents, of course, no equal protection problems. For Judge Goodwin, this property analogy neatly took care of any equal protection problems in dividing up the fishery. (Pet. No. 78-119, A6-9)

[40]See U.S. Br. 6 for a listing of these treaties.

follow in structure and wording the Treaty of Medicine Creek, 10 State. 1132. Thus, the textual problem can be seen by examining the structure and wording of that treaty.

In Article I, "* * * *said tribes and bands of Indians* hereby cede, relinquish, and convey to the United States * * *" (emphasis supplied) all right and interest in the lands described thereinafter.

In Article II, as already noted, certain specified lands are then reserved "* * * for the present use and occupation of the *said tribes and bands.*" (Emphasis supplied)

In Article III, however, the right of taking fish is secured to "*said Indians,*" (emphasis supplied) not to "said tribes and bands."

And then, in Article IV, the United States agrees to pay a specified sum of money "*to said tribes and bands.*"

If the reference in Article III were to "*said tribes and bands,*" just as it was in Article I, II, and IV, the argument of the Tribes and the United States would have a strong textual basis. But that is not how Article III reads.[41]

Further, as shown by Articles I, II, and IV, when the treaty draftsmen wanted to secure rights to the tribes and bands, as such, they knew exactly how to do it. Far from indicating the fishing right to be tribal, as such, the text indicates just the opposite.

There are other problems as well, best illustrated by focusing again on the land analogy. Since the lands belong

[41]There is one exception: Article III of the Treaty with the Yakimas *does* secure the fishing right to "said confederated tribes and bands." But the conclusion that in the case of the Yakimas the fishing right is tribal does not inevitably lead to the conclusion that the treaty carries with it a 50% plus allocation. The Yakima Reservation is east of the Cascade mountains, one hundred miles or more from Puget Sound. Most of the Yakima fisheries were, and are, on the Columbia River, outside of the area involved in this case. Some Yakimas did, however, fish on tributaries of Puget Sound with the consent of the Indians living there. F.F. 153-54 (JR 156-57). To assert, under those circumstances, that the Yakima treaty secured to the tribe 50% plus of all the salmon returning to any of the stations on which any members of the tribe customarily fished is simply to highlight the absurdity of the construction of the treaties presented by the tribes and the United States.

to the Tribe, as such, the Tribe can, as is the case with any landowner, use it in any manner it wishes without losing any of its rights to the land.[42] The tribe can lease it to non-Indians for farming, as happens on the Yakima reservation; or sell coal mining rights to non-Indians, as happens on the Navajo reservation; or enter into oil and gas leases with non-Indians, as has happened in Oklahoma. The Tribe can do all these things precisely because it owns the land.

Can it deal with its purported tribal fishing rights in the same manner? Specifically, can it license non-Indians to harvest the tribal entitlement? Such a licensing scheme would, of course, make a great deal of economic sense both for the licensing tribe and the licensed non-Indian fishermen, especially in those cases in which the tribal fishermen are not harvesting their full entitlement. If, as asserted by the Tribes and the Solicitor General, the Indian entitlement is truly tribal, each tribe certainly should be able to engage in such licensing, just as the state licenses non-Indians to harvest the non-Indian entitlement. If the land analogy is to be applied at all, it certainly should be applied here.

In fact, it is not so applied, even by the District Court. After Final Decision No. 1, a number of questions were posed to the District Court, including the following:

> 20. Can a person who is not an enrolled member of a particular treaty tribe exercise, or assist in the exercise of, the treaty fishing right of, or on behalf of, a member of such tribe? 384 F. Supp. *supra* at 412 J. A. 214

[42]Since the land is presumably held in a trust status, of course, any tribal decision is subject to federal approval.

The answer was essentially "No."[43] But if the right is truly tribal, the answer should logically be an unqualified "Yes." The fact that the District Court was unwilling to take this logical step shows the lack of foundation for the whole "tribal right" argument.

There is yet another difficulty. Just as it is not profitable "* * * to indulge the pretense that those [Indians] who executed the treaties of 1854 and 1855 had in mind the rules of the English common law" (U.S. Br. 58) neither is it profitable to indulge the pretense that those same Indians understood the legal distinction between tribal rights and individual rights. After all, the blunt fact is that the various tribes were essentially the creations of Governor Stevens, who combined villages and bands together for the administrative convenience of the United States. The District Court itself recognized this fact:

> "Governor Stevens was directed that in making the treaties, he should endeavor to unite the 'numerous bands and fragments of tribes into tribes * * *'". (Final decision No. 1, F.F. No. 17, JA-107)

And again, in Finding of Fact No. 18:

> "No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, deliberately created political entities for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and sub-chiefs. [Ex. USA–27a, pp. 14-29; Ex. USA–20, p. 28]" 384 F. Supp. *supra* at 355, JA 108.

[43]The full answer was as follows:

A. A treaty right fisherman may secure the assistance of *other tribal fishermen* with off-reservation treaty fishing rights in the same usual and accustomed places, whether or not such fishermen are members of the same tribe or another treaty tribe. A treaty right fisherman may also be assisted by his or her *spouse* (whether or not possessing individual treaty rights), *forebears, children, grandchildren and siblings.* (Emphasis supplied) JA 214 384 F. Supp. *supra* at 412

However murky the history of the treaty negotiations may be, one indisputable fact stands out: Both Governor Stevens and the Indians were concerned that the food supply on the newly created reservations might be insufficient. Absent the right to fish at their usual and accustomed fishing grounds, many Indians might go without sufficient food. And so those Indians were secured the right to fish off reservation. (See Wash. Br., 32.)

It is difficult to imagine that either Governor Stevens or the newly appointed Indian chiefs and subchiefs of the newly created tribes had anything else in mind; and if they did, there is no evidence to show it.[44]

There is one final difficulty with the tribal right theory, as support for the lower courts' division. The theory cannot be logically applied, even in the context of fishing. To show this, one of the District Court's key holdings should first be noted. It reads:

> Therefore, this court finds and holds that the amount of fish of each species from which the harvestable portions shall be determined for the purposes of allocation consistent with this opinions shall be:
>
> 1. The total number of fish within the regulatory jurisdiction of the State of Washington which, *absent harvests en route*, would be available for harvest at the treaty tribes' usual and accustomed fishing places; (emphasis supplied) 384 F. Supp *supra* at 344, JA 90

But how is "harvest en route" by Indians, fishing in their usual and accustomed grounds, to be treated? The question is far from academic.

As already noted, there are six treaties. Five are with tribes or groups of Indians who fished in Puget Sound, its tributaries or the Straits of Juan de Fuca. Each of the Indian groups was treated as independent of the others, entitled to its own lands and other rights, including the right to fish.

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[44]The Indians, of course, are entitled under the treaties to more than a subsistence fishery. See pp. 9-101 *supra*. The question here is whether the newly created tribes, as such, were to be the owners of that entitlement and, whether the supposed tribal ownership tells us anything about the extent and nature of that entitlement.

Some of the salmon migrating from the Pacific Ocean to their spawning grounds pass through the "usual and accustomed fishing grounds of all five of the groups of treaty Indians; almost all of the fish pass through more than one.

The most westerly of the treaty tribes are the Makahs, whose usual and accustomed grounds include all of the most westerly portion of the Straits of Juan de Fuca under the sovereignty of the United States. Under the theories of the lower courts, the Makahs are entitled to 50% plus share of all of the salmon passing through their usual and accustomed grounds. Fully exercised, that would leave less than half of the resource to reach the grounds of the Indians signatories to the Point No Point treaty whose homes are next to the east along the straits and Puget Sound. The Point No Point Indians could then take 50% plus of that remainder.

By the time the few remaining salmon reached the grounds of the Indian beneficiaries of the Medicine Creek Treaty, the most southerly group on Puget Sound their 50% plus share would be of a tiny return—and next to nothing would be available to nontreaty citizens.

In short, the "tribal right" theory provides no legal basis for the division decreed by the lower courts; and further, the division itself cannot be consistently applied.

VI.
"IN COMMON" IN AN INTERNATIONAL TREATY

The tribes (Tribal Br. 142-50) and the United States (U.S. Br. 68) have referred to other United States treaties containing "in common" language. While, we disagree with the conclusions drawn in those briefs, we do agree that treaties are extremely helpful in resolving this controversy.

In 1818 a treaty was made between the United States and Great Britain providing for participation by United States fishermen in certain fisheries in British waters off the coast of Newfoundland, Labrador and neighboring islands. That treaty (Convention with Great Britain, 8 Stat. 248, proclaimed 20 October 1818) provided:

> The inhabitants of the said United States shall have forever, in common with the subjects of his Britannic Majesty, the liberty to take fish * * *"

These fisheries had previously been enjoyed by the inhabitants of the American colonies prior to the Revolutionary War, when they had, of course, been British subjects.

There are substantial similarities between this 1818 Treaty and the Indian treaties giving rise to the present controversy. Not only are the fishing provisions in the 1818 Treaty similar to those in the Indian treaties, but the subsequent Treaty of 1854 (10 Stat. 1089), revising the 1818 Treaty, is contemporaneous with the negotiations of the Indian treaties.[45] In light of those similarities, the decision rendered by the Permanent Court of Arbitration at the Hague, concluded on September 7, 1910 (Sen. Doc. No. 870, 61st Cong., 3rd Sess. 1910, Vol. 1 at 64, et seq.) is highly pertinent in this case, and supports the contentions made by the state respecting the proper construction of the Indian treaties.

[45]The Treaty of June 5, 1854, also described the fishing rights in terms identical to those used in the 1818 treaty, that is, both established a liberty of taking fish in common with others.

The similarities between the two sets of treaties are as follows:

(1) The treaties with Great Britain and the Indian treaties both provide for a right, in common with others, to take fish in certain geographic areas. The 1818 treaty in Article I states:

> "The inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part [geographic description of designated Canadian waters]* * *"

The Indian treaties provide:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the territory, * * *" [Treaty of Medicine Creek, 10 Stat. 1132, Article III, Pet. for Cert. A-131]

While the word "liberty" is used in the 1818 treaty and the word "right" is used in the Indian treaties, in context their meaning is identical.[46]

[46]The British negotiators requested that the word "liberty" be used, rather than "right" in negotiating the predecessor to the 1818 treaty, the Treaty of 1783, (Sen. Doc. No. 870, Vol. 2, at 23-24) which preserved in Article III the Americans' "liberty to take fish of every kind" in certain Canadian waters. This provision was repeated in the 1818 treaty. John Adams, speaking for himself and the other 1783 negotiators, explained in a letter dated August 10, 1822, how the word liberty, rather than right, was chosen. (Sen. Doc. No. 870, Vol. 2, at 318):

> "We demanded it [Article III, which preserved the American liberty to fish in certain Canadian waters] as a right and we demanded an explicit acknowledgement of that as an indispensable condition of peace; and the word *right* was in the article as agreed to by the British Ministers, but they afterwards requested that the word *liberty* might be substituted instead of right. They said it amounted to the same thing for liberty was right and privilege was right; but the *word* right might be more unpleasing to the people of England than *liberty*, and we did not think it necessary to contend for a word."

Consistent with John Adams statement, the United States in its argument to the Court of Arbitration at the Hague, stated:

> "* * * The United States submits confidently that the word *liberty* when employed alone or in a grant or concession is as broad and comprehensive a word as right, and conveys and assures the

By substituting the word "right" for "liberty" the parallel structure between the two sets of treaties is clear.

(2) Both sets of treaties reflected the need at that time to dry and cure fish which were the preservative methods. The 1818 treaty, Article I, provided:

> "* * * the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks * * *"

The comparable provision in Indian treaties provided for:

> "* * * erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." [Treaty of Point Elliott, 12 Stat. 927, Article V, Pet. No. 78-119, A-131]

(3) The revision of the 1818 treaty by the Treaty of 1854, specifically excluded shellfish from the treaty. Article I provides:

> "* * * inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shellfish, * * *"

A similar exclusion of shellfish is found in the Indian treaties:

> "* * * Provided, however, that they [Indians] shall not take shellfish from any beds staked or cultivated by citizens." [Treaty of Point Elliott, 12 Stat. 927, Article V, Pet. No. 78-119, A-131]

(4) The treaty fishing provision for United States citizens in the 1818 treaty is defined in terms of specific geographic areas in Article I. While the Indian treaties do not name the geographic areas available for the fishery, they do, by their terms, place geographical limitations upon such fishing areas by the reference in the treaty to "* * * the right of taking fish, at all usual and accustomed grounds and stations, * * *" [Treaty of

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faculty of doing the thing granted, upon as full and ample tenure without limitation or reservation, as if the word right had been employed." (Sen. Doc. No. 870, Vol. 8 at 35).

Medicine Creek, 10 Stat. 1132, Article III, Pet. No. 78-119, A-131]

(5) In neither the 1818 treaty nor in the Indian treaties is there any language expressly stating who would have the authority to regulate, if necessary, fishing activities by United States citizens or by Indians.

These are the parallels, in both language and approach, between the British treaties of 1818 and 1854 and the Indian treaties, both presenting parallel problems, i.e., determining the rights of fishermen of different nationalities to fish in the same geographic areas. In light of these parallels, the argument of the United States to the Court of Arbitration at the Hague is particularly relevant.

The tribes and the United States argue that the position taken by the United States in the Hague proceedings on the meaning of these British treaties supports their principal assertion here, i.e., that in the Indian treaties the United States intended to reserve to the tribes a 50% plus share of the fish.

Nothing in the history of the British treaties supports this argument. That history is recounted fully in the twelve volume report of the proceedings before the International Court at the Hague (Sen. Doc. No. 870, *supra*) Nothing therein even suggests that either the United States or Great Britain ever asserted that the "in common" language secured to either party a 50% division of the fish or, for that matter, any fixed share at all.

The tribes and the United States imply that the United States' reference in the Hague proceeding to the "equal measure and quality of the right" supported an even division or equal share of the fishery. (U.S. Br. 68, Tribal Br. 147-48) Nothing could be further from the truth.

Throughout those proceedings, the United States contended that American fishermen had a right to take part in a common fishery, i.e., one which was not subject to British regulations without United States concurrence. Sen. Doc. No. 870, Vol. 9 at 709, 717-19; Vol. II at 2017-18. The United States contended that if the British could

regulate American fishing without the concurrence of the United States then the rights of American fishermen would not be equal to the British. *Ibid.*; Sen. Doc. 870, Vol. 8 at 42.

In defining the words "in common" for the International court, the United States turned to the English lexicographer, Dr. Johnson, who defined the words "in common" in 1818 as follows:

> 1. Equally to be participated in by a certain number.
> 2. Equally with another; indiscriminately. (Sen. Doc. No. 870, Vol. 9 at 717.)

The United States' argument based upon these definitions, was as follows: "The first definition 'conveys no idea other than that which the lexicographer plainly states; no idea of it belonging to one more than to the other; no idea of one having any greater rights than the other; no idea save absolute equality.' " Sen. Doc. No. 870, Vol. 9 at 717.

The second definition of the words "in common," the United States argued, was controlled by the word "indiscriminately." The idea of equality had already been sufficiently covered by the first definition. Vol. 9, p. 717-19. The argument proceeded as follows:

> Therefore to say that the American fishermen 'shall have liberty to fish equally, that is to say, indiscriminately with British fishermen,' is to say that *fisheries shall be inter-mingled and thrown into hotch-potch between them to be enjoyed by them without order or arrangement between them, and as chance may enable each of them respectfully to resort to the fisheries and to enjoy them.* (Emphasis supplied.) Sen. Doc. No. 870, Vol. 9 at 718-19.

The United States insisted that the words "in common" conveyed "* * * the idea of a right to the exercise of the fishery equally and indiscriminately by the fishermen of the two nations, *as chance might enable them to exercise it, and without any superior right of the one over the other.*" *Ibid.*

Note once again precisely what the United States was attempting to accomplish by these arguments. It was not

attempting to garner 50% or any other fixed percentage of the fish for its fishermen; rather, it was attempting to make them immune from the regulatory power of a foreign country, so that American fishermen could catch all the fish they wanted, however and whenever they wanted. Hence the argument that the "in common" language created a fishing "free-for-all".

But even in this attempt, the United States failed, as the decision of the Hague court shows. The court concluded that the effect of the words, "in common" was, *inter alia*, as follows:

> * * * these words admit them [American fishermen] only as *members of a social community, subject to the ordinary duties binding upon the citizens of that community, as to the regulations made for the common benefit*, thus avoiding the bellum omnium contra omnes which would otherwise arise in the exercise of this industry; (Emphasis supplied.) Sen. Doc. No. 870, Vol. 1 at 79.

In short, the American fishermen were not immune from the regulatory power of a foreign country. And the Hague Court concluded that under the treaties Great Britain (and derivatively, Canada or its provinces) had the authority to regulate the fishery in a manner which was necessary or appropriate for the protection and preservation of the fisheries. (Sen. Doc. No. 870, Vol. 1, at 82, 83, 85) This regulatory authority extended to both American and local fishermen, provided that the regulatory pattern did not give unfair advantage to the local fishermen over the American. (Sen. Doc. No. 870, Vol. 1 at 85) And, most importantly, neither group of fishermen was given a fixed percentage of the fish.

Thus, the result of the Hague proceedings is completely consistent with the equal protection principles established in *Puyallup I* and *III*, *supra*, and with the result which we argue for here.

VII.
THE HISTORICAL CONTEXT OF THE TREATIES

To help this Court determine the nature and extent of the "in common" fishery secured for Indian and non-Indian alike by these treaties, the State drew this Court's attention to the historical context of the treaties in its opening brief. (State Br., 31-5; 42-56.) The United States and the tribes, however, uncomfortable with the lower courts' varied rationales for the 50% plus allocation, have now adopted a "reasonable needs" rationale for that division,[47] without any significant historical or textual basis for such a division. We return to that historical context briefly to help this court construe the treaty provisions in the light of the "* * * common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

Prior to the negotiation of these treaties in 1854-55, the United States claimed sovereignty over the area now known as the State of Washington by discovery, settlement and the treaty extinguishment of the conflicting claims of Spain, Russia and Great Britain. When the U.S. signed the treaty with Great Britain of June 15, 1846, 9 Stat. 869, its claim to sovereignty over the area was complete.

In 1854, the Indians of Western Washington did not have a formal political structure and were organized loosely, if at all. (F.F. 15, JA 106.) Therefore, it was necessary for Governor Stevens to create tribes and bands with leaders or chiefs in order to have political entities with which to negotiate. (F.F. 17, 18; JA 107, 108.) The treaty negotiations with those newly organized tribes involved but one sovereign, the United States.

The treaties were intended only to extinguish Indian claims of title to land in the Washington Territory. Neither the Act authorizing the negotiations of these treaties,[48] nor the letter of instruction to Isaac Stevens even mentioned

[47]U.S. Br., 62; Tr. Br., 160.

[48]Act of June 5, 1850, 9 Stat. 437.

Indian fishing rights as a subject of negotiation.[49] Non-Indians obviously already had the right to fish, a right derived from the sovereignty of the United States. The American negotiators were not authorized to treat away any U.S. governmental authority. (F.F. 19, JA 108, 109.)

In 1854-55, Western Washington was sparsely populated with 2,000 non-Indians and widely dispersed Indian settlements containing about 8,000 Indians. (U.S. Br. 55) While Indians caught most of the fish, including those consumed by non-Indians, non-Indians did fish for themselves as well. (F.F. 7, JA 102) Moreover, non-Indian commercial enterprises, although rudimentary, were in existence and in production during the 1840's and 1850's. (F.F. 8, JA 102) Those non-Indians obviously fished under a claim of right and not at the sufferance of the Indians. Non-Indians could not have been charged with a criminal offense in an Indian court for fishing. *Oliphant v. Suquamish Tribe, supra.* Nor could the Indians have enjoined non-Indian fishing in a United States court.

In short, Indian and non-Indian alike shared in a common fishery. The treaties did not change this situation. While Governor Stevens assured the Indians that he did not intend to stop Indian fisheries, he also made it clear that the Whites would also fish. (F.F. 20, JA 109; Ex. PL-16(b), JA 331; Ex. PL-22, JA-331-332)

Though there was no intent to exclude Indians from fishing for economic gain, the negotiators seem to have envisioned agriculture as the mainstay of the future Indian economy. (F.F. 21, JA 109) This is brought out most strikingly in Article X of the Treaty of Medicine Creek, 11 Stat. 1132:

> The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to

[49]Ex PL 1, 34 Letter dated August 30, 1854, from the Acting Commissioner of Indian Affairs, Charles Mix, to Isaac Stevens; the letter is reproduced as App. A in the Brief for Respondents filed in *Oliphant v. Suquamish Indian Tribe*, Oct. Term 1977, No. 76-5729.

> support, for a period of twenty years, *an agricultural and industrial school,* to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and *to provide the said school with a suitable instructor or instructors,* and also *to provide a smithy and carpenter's shop,* and furnish them with the necessary tools, *and employ a blacksmith, carpenter and farmer,* for the term of twenty years, *to instruct the Indians in their respective occupations.* (Emphasis supplied)

Cf., also, Article XI, Treaty of Point No Point, 12 Stat. 933. All of the instant treaties contained such provisions.

Consistent with that treaty provision, negotiators contemplated that Indians would become less dependent on fishing as they became increasingly westernized and successful in their agricultural pursuits. (Ex. D-1, p. 27-28)

The United States suggests that if an apportionment is not provided for in the treaties, then the Indians would be left with an empty right. (U.S. Br., 64, 66) The tribes suggest that if the State argument (that no apportionment was intended) is accepted, a virtual preemption of the treaty right would occur. (Tr. Br., 106) These suggestions ignore this Court's injunction to read treaties in light of the common notions of the day and the assumptions of those who drafted them. *Oliphant, supra,* at 206.

In the mid-1850's, Indians were not citizens of the United States. The Fourteenth Amendment had not yet been passed and the Fifth Amendment would not have protected Indians in the exercise of any off-reservation fishing activity. Without the treaty provisions for fishing at the usual and accustomed off-reservation places, the Indians would not have had the right to leave their reservations to seek fish. The treaty fixed an easement in off-reservation lands to assure them access to those places. It secured to them the same right to fish as that possessed by citizens. It gave them equal protection guarantees before the equal protection clause was written. It was far from an empty promise. But the right was to be exercised "in common with the citizens of the Territory."

VIII.
TREATY INDIANS WILL CATCH A SIGNIFICANT SHARE OF THE SALMON IN AN EQUAL OPPORTUNITY FISHERY

In *Puyallup II, supra,* this court found that the state regulatory system for steelhead on the Puyallup River, though neutral on its face, had a discriminatory effect and thus violated the treaty. The effect of that regulation was to reserve all of the steelhead for non-Indian sportsmen while prohibiting any Indian net fishery. It was that denial of any Indian net fishery which discriminated against the Indians and conflicted with the "in common with" language of the treaty. In the salmon fishery a regulatory system permitting an equal opportunity fishery is by its nature and effect non-discriminatory.

In 1973, Washington began legal efforts to limit the size of the non-Indian commercial fishing fleet. A "moratorium" law restricts the issuance of state licenses to fishermen who previously had been engaged in fishing during a qualification period. The original statute, RCW 75.28.420, applied only to the herring fishery for 1973 and subsequent seasons. The moratorium was subsequently extended in 1974 to all non-Indian commercial salmon licenses (RCW 75.28.455) and in 1977 to licenses for charter boats, RCW 75.30.020, (boats which take sports fishermen salmon fishing for a fee).

The moratorium has limited the size of the non-Indian commercial fleet. But treaty Indians are not required to purchase a state license for fishing in their usual and accustomed grounds (*Tulee v. Washington,* 315 U.S. 681 (1942)) so the expansion of the Indian fishing fleet is not affected by the state moratorium and the expansion of that Indian fleet has continued.

Since 1975 the moratorium program has been supplemented by a "buy-back" program. (RCW 75.28.500 et seq.) Using federal funds, commercial fishing boats and licenses are purchased by the state. The boats are then resold with a restriction that they can never again be used in Washington commercial fisheries, RCW 75.28.520. Licenses once purchased are retired so the number of

non-Indians who can participate in the fishery declines. The proceeds from the boat sales go into a revolving fund used to buy more boats, gear and licenses. Under the terms of a district court injunction (now on appeal), treaty Indians can buy these boats and use them for commercial fishing in Washington.

Under an "equal opportunity" interpretation of the "in common" language, treaty Indians will continue to enjoy the right to participate in the fishery without procuring a license. The continuation of the state's moratorium on issuance of licenses and the "buy-back" program will reduce the number of non-Indian fishermen and thus decrease competition for Indian fishermen. Treaty Indians will also continue to benefit from the state's enhancement program.

The state of Washington has historically been involved in fish enhancement programs and is now engaged in an expanded massive effort involving over forty hatcheries and related facilities. In 1977, the State authorized an expenditure of over 30 million dollars for fishery enhancement. To finance the costs of the program license fees taxes on fish processors were increased and a sports license was required for non-ocean fisheries. (ch. 327 1st ex. sess. Wash. Laws of 1977.)

The number of treaty fishermen has increased from 794 at the time of the *U.S. v. Wash.* trial to over 1,200 at the present time (Tribal Br. 59). Not only is there the potential for further increases, which is not available for non-Indians due to the moratorium, but more importantly there has been a qualitative increase in capacity of the Indian gear to harvest the resource. Indians have acquired a number of purse-seine vessels which are expensive, highly-effective fishing boats. Similarly modern gillnetters have proliferated in the Indian fleet as a result of assistance from the tribes and the United States government.

At the time of the original trial in *U.S. v. Wash.*, there were found to be few treaty Indian fishermen with boats and gear comparable to the non-Indian fleet. By contrast, in 1977, the number of boats owned by treaty Indian

fishermen, which were comparable to the non-Indian fleet, were 51 trollers, 10 purse seiners and 244 gillnet boats. In addition, the Indians have 313 marine gillnet skiffs (smaller boats) (Fed. Task Force Rept. 183).

As a result of all these factors the capability of the present Indian fleet has substantially expanded in recent years. That increased harvest capacity resulted in the Indian fleet harvesting 20% of the American share when the United States, in regulating the IPSFC fishery in 1978, had intended to provide the Indians with only 10-15% of the harvest.

Numerous tribes have established tribal enterprises for merchandizing of fish products. Profits that earlier would have gone to non-Indian "middlemen" are thus presently available to the Indian community.

As a result of all these factors, the number (and poundage) fo fish caught by treaty Indians under an "equal opportunity" interpretation of the "in common with" languge will continue to be many times what the Indian fishery could have been harvesting at treaty times, or even at the time of the district court decision.

To the extent that a historical low Indian fish harvest was caused by insufficient participation by Indian fishermen and gear, the remedy has been applied. The United States has recently commenced to fulfill its trust responsibilities by aiding Indians to acquire fishing gear. It should be recognized that the reduction of fishing gear by the buy-back program is funded by the United States.

The Federal Task Force recommends the continuation of the gear-up/gear-down program; that is increasing Indian gear while reducing non-Indian gear.

Not only do some of the treaty fishermen have modern commercial fishing boats and gear, but treaty fishermen also use the more effective types of stationary gear; numerous set gill nets and even several fish traps. For non-Indians, the use of "fixed" gear is barred by statute.

It is somewhat ironic that the treaty Indian fishermen assert a right to use potentially destructive devices such as fish wheels and traps which the Winans Brothers operated

to the exclusion of Indian fishermen. *U.S. v. Winans*, 198 U.S. 371 (1905). Such devices, along with all fixed gear (especially in streams) were prohibited in the State of Washington in the early part of this century. The target of that legislation was not (as some Indian counsel would have the Court believe) the Indian fishermen. Rather, the target was the big concerns such as the Winans Brothers, who were perceived as monopolizing and destroying the resource.

Further, the state has cooperative agreements with many of the tribes whereby the Fisheries Department provides fish eggs or fry, expertise, and, in some cases, food for the raising of fish. Some are reared in pens until they can be sold. Most, however, are released to return one or more years later. These fish raising programs have increased the Indian catch and will do so increasingly.

An equal opportunity interpretation of the treaties will also return order and certainty to the management (by the state) of the fishery with concomitant benefits to the resource itself. This will provide long-term benefits in the form of increased salmon runs available to all fishermen.

Finally, such an interpretation will largely remove the courts (state and federal) from continuous participation in technical aspects of the fish resource management. Fisheries management is sufficiently complicated and often requires emergent action. Court proceedings complicate the effective management of the fishery resource.

As to the harvest by the Indian community, the above factors combine with other recent events to assure a large and *increasing* harvest by treaty Indian fishermen. Not only do they have the advantage of participating in an increasing harvest with decreasing competition but the Indian fleet has dramatically increased both quantitatively and qualitatively in recent years.

IX.
THE RELEVANCE OF AFFIRMATIVE ACTION IN THIS CONTEXT

The State cannot overlook the fact that it is faced in these cases with literally hundreds of pages of briefs from the tribes and their amici[50] charging the State and its citizens with both deliberate violations of treaty rights and systematic racial discrimination directed at treaty Indians. The State vehemently denies those allegations and believes them to be unsupported by the findings and conclusions in the original district court decision.

The State must recognize, however, that a court might view the facts differently and that it might deem some form of affirmative action appropriate to restore the treaty Indians to a place in the fishery which they would have had absent any such discrimination.

Justice Powell in *Regents of University of California v. Bakke*, ____ U.S. ____, 46 L.W. 4896 (June 28, 1978), with reference to affirmative action relief, said:

> "* * * The scope of the remedies was not permitted to exceed the extent of the violations." (*supra* at 46 L.W. 4904.)

And Justice Brennan observed in the same case:

> "* * * that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to the achievement of those objectives.'" (*supra* at 4920)

And, Justice Blackmun observed:

> "I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past." (*supra* at 4932)

While the Justices in *Bakke* reflected substantial disagreement in reviewing the admissions policy of the California Board of Regents, the members of the Court do reflect, in various opinions, an agreement that if a

[50] At least two of which are represented by counsel who have been counsel of record for tribes in this litigation.

particular affirmative action program is legally permissible, it is permissible only to the extent necessary to remedy past practices by means of a remedy devised to be transitional and not permanent, on-going and unchangeable.

The point here is that the State has not had a day in court on any allegations about the existence or the extent of any discrimination. Both the United States and the lower courts have treated this litigation as involving exclusively the permanent and immutable meaning of the treaties. Their decisions are the antithesis of the doctrine of equal protection and affirmative action. If the State is to be charged with a form of discriminaiton which violates the requirements of equal protection, it is at least entitled to a trial on those charges and a remedy suited to any violations which it is found to have committed.

The common thread in the affirmative action cases[51] which differs from the present case is that the affirmative action cases reflect an effort by a temporary remedial action, the length of which is unknown, to accomplish a real as well as a theoretical equal application of the law in our society. In contrast, the present decisions provide not that sort of remedy but rather declare a fixed right which is permanent and is the antithesis of equal opportunity.

As indicated in the preceding section, the quantity and quality of Indian fishing gear has substantially improved since the original 1974 decision. This increase has provided Indians with the capacity sustantially to increase their participation in the fishery even if that fishery is conducted on the basis of an equal opportunity for all fishermen. This increase in equipment can continue and undoubtedly will do so. We submit that if a transitory period was needed to effectuate an increased participation by the Indians in the fishery harvest, that transitional period has already taken place. The developments which

[51]E.g., bussing of school children, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); special admission programs, *Regents of University of California v. Bakke*, *supra*, *De Funis v. Odegaard*, 416 U.S. 312 (1974); employment, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1975).

have occurred since the original district court decision; i.e., the increase in the number of Indian fishermen, the influx of federal funds and programs, and the decrease in the non-Indian fishermen by virtue of the moratorium program has reached a stage not requiring any further affirmative action programs, at least without a specific finding that such programs are necessary by reason of specifc state action.

The federal government in its guardian responsibility for the tribes does not need a court decree in order to continue its program of assisting Indian tribes and tribal members.

CONCLUSION

In this brief, we have said little about the International Fishery case (before the Court in No. 78-119), the two state cases (before the Court in No. 77-983) or the case involving the 1978 enforcement order (before the Court in No. 78-139). Instead, we have focused almost exclusively on the issues involved in the Washington Fishery case (before the Court in No. 78-119). This has been deliberate.

As this proliferation of cases shows, the Court is presented with a legal Gordian knot. But that knot can be easily cut. It can be cut by addressing and deciding the basic issue, the proper meaning of the "in common" language of the treaties. All of the complications in the other cases, including all the enforcement problems, stem from the district court's erroneous construction of this language — the construction affirmed in the Washington Fishery case. Once that construction is corrected by this Court, the myriad of other issues in the other cases will, we believe, become manageable, if they do not disappear entirely.[34]

Accordingly, once the basic ruling of the lower federal courts in the Washington fishery case is reversed, the

[34]Not all of the litigation stemming from the district court's basic decision is before this Court. As the Solicitor General correctly observes, each new season in the IPSFC fishery gives rise to a new round of litigation. (U.S. Br. 41-43) An example is found in *Purse Seine Vessel Owners Ass'n v. State*, 584 F. 2d 931 (9th Cir. 1978). The United States defends, in part, by claiming that under the Washington fishery case, the United States is required to provide a special treaty entitlement, through special Indian regulations. Yet in this Court, they argue that "* * * there is no issue properly before this Court regarding that [IPSFC] fishery." (U.S. Br. 76) The Ninth Circuit saw the obvious connection.

> The interpretation and effect of the decree in *United States v. Washington* [Washington Fishery case] are issues which are presently pending before the United States Supreme Court. Under these circumstances, it would be inappropriate for us further to pursue the issues. (*PSVOA v. State*, 584 F. 2d 931 (1978) at 934). (Footnote omitted.)

judgments in all the cases now before the Court should be reversed for further proceedings in accordance with the Court's opinion.

DATED this 22nd day of February, 1978.

Respectfully submitted,

SLADE GORTON,
Attorney General,

EDWARD B. MACKIE,
Deputy Attorney General,

JAMES M. JOHNSON,
Sr. Assistant Attorney General,

TIMOTHY R. MALONE,
Assistant Attorney General,

Counsel for Petitioner State.